SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 589.

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

EUGENE BUCHANAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

1 Pleas in the District Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the twenty-ninth day of June, A. D. 1912, the same being one of the regular juridical days of the May term, A. D. 1912, of said court; present, the honorable Robert E. Lewis, district judge, the following proceeding was had and entered of record in said court, to wit:

In the matter of the grand jury.

Indictments returned.

At this day come the members of the grand jury, heretofore duly empanelled and sworn as grand jurors, and return into court now here the following true bills of indictment and not true bills of indictment, to wit:

* * * * * * *

THE UNITED STATES OF AMERICA *vs.* EUGENE BUCHANAN.	5951. Indictment for obstruction of settlement and entry of public lands.

(Endorsed:) A true bill.
(Signed) WILLIAM E. SWEET, *Foreman.*

2 And thereupon it is ordered by the court that a bench warrant issue without delay against the defendant and returnable forthwith, and that the defendant be let to bail before a United States commissioner in the sum of one thousand dollars ($1,000) for his appearance in this court from day to day and from term to term to answer unto the indictment herein.

* * * * * * *

And the said indictment is in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

At the May term of the District Court of the United States, within and for the District of Colorado, in the year of our Lord one thousand nine hundred and twelve, begun and held at the city and county of Denver, in said district, on the first Tuesday in May, in the year of our Lord one thousand nine hundred and twelve.

The grand jurors of the United States of America, within and for the district of Colorado, good and lawful men, duly selected, impaneled, sworn, and charged, on their oaths present:

3 That James H. Scott, and Martha E. Scott, his wife, as heirs at law of one Edward Scott, who died intestate on, to wit, the twenty-eighth day of March, in the year of our Lord one thousand

nine hundred and ten, leaving neither widow nor children, they, the said heirs, being then and there duly qualified, did, by virtue of the homestead laws of the United States, become vested of all the right and interest which were at the said date of the death of the said Edward Scott vested in him, the said Edward Scott, in and to a certain tract of land embraced in a certain homestead entry theretofore made by him, the said Edward Scott, to wit, the northeast quarter of section thirty-four, in township twelve north, range fifty-three west of the sixth principal meridian, in the State of Colorado, which said homestead entry had been made by him, the said Edward Scott, at the United States land office at Sterling, in the State of Colorado, on, to wit, the twenty-third day of February, in the year of our Lord one thousand nine hundred and seven, he, the said Edward Scott, then and there being a citizen of the United States and duly qualified to make said homestead entry, and which said homestead entry was in full force and effect at the said date of the death of the said entryman, as aforesaid, and thereafter at all times mentioned in this indictment the said heirs
4 were in lawful possession of and were engaged in cultivating the said homestead land, as aforesaid, for the purpose of protecting their right to same, under the laws of the United States, as heirs to the said homesteader, the right of them, the said heirs, to title and a patent from the United States to said land not having accrued then or at any time mentioned in this indictment.

That Eugene Buchanan, late of the town of Sterling, in the State of Colorado, on, to wit, the first day of May, in the year of our Lord one thousand nine hundred and eleven, in the county of Logan, within the State and district of Colorado, and within the jurisdiction of this court, willfully, wickedly, unlawfully, and feloniously did prevent and obstruct them, the said heirs, James H. Scott and Martha E. Scott, from peaceably entering upon and establishing a settlement and residence on the said homesteaded land of the United States subject to settlement and entry under the public-land laws, by going on said homesteaded land with force and arms and driving therefrom the tenants of the said heirs lawfully thereon and tearing down, destroying, and carrying away the buildings and other improvements thereon, the said buildings and other improvements being then and there attached to and a part of the said home-
5 stead land; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY E. KELLY,
United States Attorney for the District of Colorado.

(Endorsed:) No. 2665. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan. Indictment: Obstruction of settlement and entry of public lands. Ch. 149, 23 Stat. L., 321. A true bill. William E. Sweet, foreman.

Filed Jun. 29, 1912. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado, sitting at Denver.

The President of the United States of America to the Marshal of the District of Colorado, greeting:

You are hereby commanded that you take the body of Eugene Buchanan, if he shall be found in your district, and safely him
6 keep, so that you have his body before the District Court of the United States for the District of Colorado, at the United States courthouse, in the city and county of Denver, in said district, forthwith, to answer unto the United States of America in a certain bill of indictment preferred against him in said court for obstruction of settlement and entry of public lands and have you then and there this writ, with due return thereon endorsed.

Witness the honorable Robert E. Lewis, judge of the District Court of the United States for the District of Colorado, and the seal thereof, at the city and county of Denver, in said district, this 12th day of August, A. D. 1912, and of the Independence of the United States the 137th year.

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*.

[Seal U. S. Dist. Ct.]

UNITED STATES OF AMERICA,
District of Colorado, ss:

I have duly served the within writ by arresting the within-named Eugan Buchanan at 38 miles N. W. of Sterling, Aug. 15, 1912, and taking his before David Beattie, United States commissioner at Sterling, whair he gave bonds in the sum of 1,000.00 and was released Aug. 15, 1912.
7

By D. C. BAILEY, *Marshal*.
THOMAS CLARKE, *Deputy Marshal*.

(Endorsed:) No. 2665. District Court of the United States for the District of Colorado. The United States vs. Eugene Buchanan. Bench warrant. The defendant may be let to bail before an United States commissioner in the sum of $1,000.00. Charles W. Bishop, clerk. Filed Aug. 17, 1912. Charles W. Bishop, clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for said district.

No. 2665.

UNITED STATES OF AMERICA
vs.
EUGENE BUCHANAN, DEFENDANT. } Demurrer to indictment.

Comes now the defendant, Eugene Buchanan, by his attorneys, and demurs to the indictment in the above-entitled cause heretofore presented against him, and for grounds of such demurrer says:

1. That said indictment and the matters and things therein
8 alleged and set forth are insufficient to constitute any offense whatsoever against the laws of the United States.

2. That said indictment does not charge the defendant with the commission of any offense against, or crime under, the laws of the United States.

3. That said indictment does not charge the defendant with the commission of any offense against, or crime under, section 3 of chapter 149 of volume 23 of the United States Statutes at Large, page 322, being act of Congress of February 25, 1885, upon which said statute said indictment is sought to be based.

4. That said indictment does not charge or allege any offense of which this court has jurisdiction.

5. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that the said James H. Scott and the said Martha E. Scott, or either of them, mentioned in said indictment, at any of the times mentioned in said indictment, had any right, title, or interest in or to said land mentioned and described in said indictment, or any right to enter upon or establish a settlement or residence on said land, for that said indictment fails to charge any fact or facts from which it would appear as a matter of
law that the said James H. Scott and the said Mary E. Scott,
9 or either of them, were or are the heirs at law of said Edward Scott, mentioned in said indictment.

6. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that the said James H. Scott and said Mary E. Scott, or either of them, at any of the times mentioned in said indictment, had any right, title, or interest in or to said land, mentioned in said indictment, or any right to enter upon or establish a settlement or residence on said land, for that said indictment fails to charge that at any time mentioned in said indictment, or at any time, the said James H. Scott and the said Mary E. Scott, or either of them, were citizens of the United States.

7. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that said James H. Scott and the said Mary E. Scott, or either of them, at any of the times mentioned in

said indictment, or at any time, were qualified, under the laws of the United States, to homestead said land mentioned in said indictment, or to enter upon, or to establish a settlement or residence on, said land, as the alleged heirs at law of the alleged entryman of said land, to wit, said Edward Scott, or otherwise.

10 8. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that at any of the times mentioned in said indictment, or at any time, the said land described in said indictment was public land subject to settlement or entry under the public-land lands of the United States.

9. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that the said James H. Scott and the said Mary E. Scott, or either of them, at any of the times mentioned in said indictment, had any right, title, or interest in or to said land, or any right to enter upon or establish a settlement or residence on said land, as the alleged heirs at law of said Edward Scott, for that said indictment fails to allege any fact or facts from which it would appear that said Edward Scott, at any of the times mentioned in said indictment, resided upon and cultivated said land as a homestead, in accordance with the homestead laws of the United States.

10. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that the said James H. Scott and the said Mary E. Scott, or either of them, at any of the times mentioned in said indictment, had any right, title, or interest in or to said

11 land, or any right to enter upon or establish a settlement or residence on said land, as the alleged heirs at law of said alleged entryman, Edward Scott, for that said indictment fails to charge that at the date of the death of said Edward Scott, or at any time prior thereto, he resided upon and cultivated said land as a homestead, in accordance with the homestead laws of the United States.

11. That said indictment is insufficient and wholly defective, in that it fails to allege or charge any fact or facts to sustain the legal conclusion in said indictment set forth that "said homestead entry was in full force and effect at the said date of the death of the said entryman."

12. That said indictment is insufficient and wholly defective, in that it fails to allege or charge that the said James H. Scott and said Mary E. Scott, or either of them, at any of the times mentioned in said indictment, had any right, title, or interest in or to said land, or any right to enter upon or establish a settlement or residence on said land, for that said indictment fails to allege that said James H. Scott and said Mary E. Scott, or either of them, were residing upon and cultivating said land at the time of the commission by defendant of the alleged acts charged in said indictment.

12 13. That said indictment is insufficient and wholly defective, in that it fails to charge any fact or facts from which it would appear that defendant, by any unlawful means, did prevent or obstruct the said James H. Scott and the said Mary E. Scott, or either of them,

from peaceably entering upon or establishing a settlement or residence upon said land mentioned in said indictment.

14. That said indictment is insufficient and wholly defective, in that it fails to allege that defendant did prevent or obstruct the said James H. Scott and the said Mary E. Scott, or either of them, from peaceably entering upon or establishing a settlement or residence on said land described in said indictment, for that said indictment fails to charge that the alleged tenants of said James H. Scott and said Mary E. Scott, mentioned in said indictment, were at the time of the alleged commission by defendant of the alleged acts charged in said indictment, or at any time, upon said land for the purpose of entering the same or establishing a settlement or residence on said land for or on behalf of said James H. Scott and said Mary E. Scott, or either of them, or that said alleged tenants were residing upon said land, or cultivating said land, or otherwise on said land for the purpose of protecting the alleged rights of said James H. Scott and said Mary E. Scott to said land under the laws of the United States as heirs to said alleged homesteader, said Edward Scott, or otherwise; and for that said indictment fails to charge that the said buildings and said improvements on said land mentioned in said indictment were at the time of the alleged commission by defendant of the alleged acts charged in said indictment, or at any time, the property of the said James H. Scott and the said Mary E. Scott, or either of them, or the property of said alleged tenants, or that the said James H. Scott and the said Mary E. Scott, or either of them, or said alleged tenants, were at any of the times mentioned in said indictment entitled to the possession of said buildings and said improvements mentioned in said indictment, or that said buildings and improvements were in any manner whatsoever used in entering upon or establishing a settlement or residence on said land.

15. That said indictment is insufficient and wholly defective, in that it fails to allege that defendant did prevent or obstruct the said James H. Scott and the said Mary E. Scott, or either of them, from peaceably entering upon or establishing a settlement or residence on said land described in said indictment, for that said indictment fails to charge that the alleged tenants of said James H. Scott and said Mary E. Scott, mentioned in said indictment, were at the time of the alleged commission by defendant of the alleged acts charged in said indictment, or at any time, upon said land for the purpose of entering upon said land, or establishing a settlement or residence on said land, for or on behalf of said James H. Scott and said Mary E. Scott, or either of them, as the alleged heirs of said alleged homesteader, Edward Scott, or otherwise, or that said alleged tenants were residing upon said land, or cultivating said land, or were otherwise on said land for the purpose of protecting the alleged rights of said James H. Scott and said Mary E. Scott to said land, under the laws of the United States, as alleged heirs at law of said alleged homesteader, said Edward Scott, or otherwise.

16. That said indictment is insufficient and wholly defective, in that it fails to allege that defendant did prevent or obstruct the said James H. Scott and the said Mary E. Scott, or either of them, from peaceably entering upon or establishing a settlement or residence on said land described in said indictment, for that said indictment fails to charge that the said buildings and said improvements on said land, mentioned in said indictment, were at the time of the alleged commission by defendant of the alleged acts charged in said indictment, or at any time, the property of the said James H. Scott and the said Mary E. Scott, or either of them, or the property of said alleged tenants, or that the said James H. Scott and the said Mary E. Scott, or either of them, or said alleged tenants, at any of the times mentioned in said indictment, had any right, title, or interest whatsoever in said buildings and said improvements mentioned in said indictment, or were entitled to the possession of said buildings and said improvements, or that said buildings and said improvements were in any manner whatsoever used or employed by the said James H. Scott and the said Mary E. Scott, or either of them, or by said alleged tenants, in entering upon or establishing a settlement or residence on said land, or were ever the property of said Edward Scott.

17. That said indictment is insufficient and wholly defective, in that it fails to charge that defendant, by force, threats, or intimidation, or by fencing or enclosing, or by any other unlawful means, did prevent or obstruct the said James H. Scott and the said Mary E. Scott, or either of them, from peaceably entering upon or establishing a settlement or residence upon said land mentioned in said indictment.

18. That said indictment is insufficient and wholly defective, in that it fails to charge that the alleged acts of defendant, as set forth in said indictment, were done or committed by defendant, without claiming title to said land mentioned in said indictment, in good faith, or without claiming title to said buildings and improvements mentioned in said indictment, or without any claim or color of title to, or asserted right to, said land or said buildings, or said improvements thereon.

19. That said indictment is insufficient and wholly defective, in that it fails to charge that defendant had never gone upon or improved or occupied said land under the land laws of the United States, claiming title thereto in good faith, at any time prior to the alleged commission by defendant of the alleged acts charged in said indictment.

Wherefore, said defendant prays judgment of said indictment, and that the same may be quashed and for naught held, and defendant be forthwith dismissed and discharged.

S. E. Naugle,
Chas. W. Waterman,
Attorneys for Defendant.

Caldwell Martin, *of Counsel.*

17 (Endorsed:) No. 2665. U. S. District Court of Colorado. United States of America vs. Eugene Buchanan et al., defendants. Demurrer to indictment. Filed Nov. 15, 1912. Charles W. Bishop, clerk. Charles W. Waterman, counselor at law, Denver, Colorado.

Sixty-seventh day, November term, Thursday, February 27th, A. D. 1913.

Present: The honorable Robert E. Lewis, district judge, and other officers as noted on the first day of February, A. D. 1913.

THE UNITED STATES OF AMERICA vs. EUGENE BUCHANAN.	2665. Indictment for obstruction of settlement and entry of public lands.

At this day comes E. B. Lacy, Esquire, assistant district attorney, who prosecutes the pleas of the United States in this behalf, and the defendant by Charles W. Waterman, Esquire, his attorney, also comes. And the demurrer to the indictment herein coming on now to be heard is argued by counsel, and the court having considered the same and being now fully advised in the premises;

It seemeth to the court now here that the indictment herein is not sufficient in law to be answered unto and so the said demurrer is hereby sustained.

18 Wherefore, it is considered by the court that the defendant of and from the premises in this said indictment specified be discharged, and go hence hereof without day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

No. 2665.

UNITED STATES OF AMERICA, PLAINTIFF, vs. EUGENE BUCHANAN, DEFENDANT.	

Plaintiff's bill of exceptions.

Be it remembered, that on the 27th day of February, A. D. 1913, the same being one of the juridical days of the regular November, A. D. 1912, term of the District Court of the United States, within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for hearing before the honorable Robert E. Lewis, judge of said court, the plaintiff appearing by E. B.

Lacy, Esq., assistant United States attorney, its counsel, and the defendant appearing by Charles W. Waterman, Esq., his counsel.

And thereupon the following proceedings were had:

19 On, to wit, the 27th day of February, A. D. 1913, this cause came on to be heard upon the demurrer to the indictment filed on the 15th day of November, A. D. 1912.

And thereupon, and on, to wit, the 27th day of February, A. D. 1913, argument was had by counsel for the respective parties, and the court being sufficiently advised in premises, made its decision and order upon the matter so heard and agreed and sustained said demurrer, and thereupon discharged the defendant (for the reason and upon the ground that said indictment, being based upon section 3 of the act of February 25, 1885 (23 Stat., 322), and purporting to charge the defendant with a criminal act in violation thereof, nevertheless the facts disclosed upon the face of said indictment do not bring the charge, as the court construes said section, within the purview and meaning of its terms, and as so construed the said indictment charges no offense against the defendant).

To which said ruling and order of the court the plaintiff, by its counsel, then and there duly excepted in open court to said action of the court.

And now forasmuch as the above and foregoing matters and things do not fully appear of record, the plaintiff tenders this its bill of exceptions by them reserved herein and prays that the same

20 may be allowed, signed and sealed by the judge of this court, and filed and made a part of the record in said cause, pursuant to the statute in such case made and provided, which is accordingly done on this 26th day of March, A. D. 1913.

ROBT. E. LEWIS, [SEAL.]
District Judge.

(Endorsed:) No. 2665. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan, defendant. Bill of exceptions. Filed Mar. 26, 1913. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

No. 2665.

UNITED STATES OF AMERICA
vs.
EUGENE BUCHANAN, DEFENDANT.

Petition for writ of error.

And now comes the United States, plaintiff herein, and says that on the 27th day of February, 1913, this court made its decision sus-

taining the demurrer to the indictment in this cause, and that
21 thereafter, and on the 27th day of February, 1913, this court, pursuant to that decision, entered judgment herein in favor of the defendant and against the plaintiff and discharged the defendant, in which judgment and decision certain errors were committed to the prejudice of this plaintiff and of such character as to entitle this plaintiff, under the law, to a review of said judgment and decision in the Supreme Court of the United States by writ of error, all of which will more in detail appear from the assignment of errors filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court.

HARRY E. KELLY,
United States Attorney.
E. B. LAGH,
Assistant United States Attorney.

(Endorsed:) No. 2665. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan, defendant. Petition for writ of error. Filed Mar. 26, 1913.
22 Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

No. 2665.

UNITED STATES OF AMERICA
vs.
EUGENE BUCHANAN, DEFENDANT.

Assignment of errors.

Comes now the United States of America, plaintiff in the above-entitled cause, and says that the judgment entered February 27, 1913, by the District Court for the District of Colorado in the above-entitled cause is erroneous and unjust to plaintiff in the following particulars:

I.

The said District Court erred in sustaining the demurrer to the indictment upon and because of an erroneous construction of section 5 of chapter 149 of volume 23 of the United States Statutes at Large, page 362, being the act of Congress of February 25, 1885, whereby

the said District Court held that the acts charged in the indict-
23 ment do not constitute a violation of said act.

II.

The District Court for the District of Colorado erred in discharging the defendant.

Wherefore the plaintiff prays that the judgment of the District Court of the United States for the District of Colorado be reversed and the said District Court be directed to reinstate the said indictment and proceed with the trial of the cause.

Dated Denver, Colorado, March 25, 1913.

HARRY E. KELLY,
United States Attorney.
E. B. LACY,
Assistant United States Attorney.

(Endorsed:) No. 9665. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan, defendant. Assignment of errors. Filed Mar. 26, 1913. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

Eighty-fourth day, November term, Wednesday, March 26th, A. D. 1913.

Present: The honorable Robert E. Lewis, district judge, and the honorable John A. Riner, judge of the District Court of the
24 United States for the District of Wyoming, assigned to hold the District Court of the United States for the District of Colorado, and other officers as noted on the first day of February, A. D. 1913.

And before the honorable Robert E. Lewis, district judge, the following proceeding was had:

THE UNITED STATES OF AMERICA *vs.* EUGENE BUCHANAN.	9665. Indictment for obstruction of settlement and entry of public lands.

On motion of the United States attorney, it appearing to the court that there has been filed herein petition for a writ of error and assignment of errors,

It is hereby ordered that the petition for a writ of error be, and hereby is, allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that a writ of error as therein prayed be issued by the clerk of the District Court for this district, under the seal of such District Court, pursuant to section 238 of the Judicial Code of the United States.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

No. 2665.

25 UNITED STATES OF AMERICA
vs.
EUGENE BUCHANAN, DEFENDANT.

To the clerk of the District Court:

SIR: You will issue and transmit to the Supreme Court of the United States a complete transcript of the record on writ of error in the above-entitled case.

HARRY E. KELLY,
United States Attorney.
E. B. LACY,
Assistant United States Attorney.

(Endorsed:) No. 2665. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan, defendant. Precipe for transcript of record. Filed Apr. 5, 1913. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Robert E. Lewis, Judge of the United States District Court for the District of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said District Court, before you, between the United States of America, plaintiff, and Eugene Buchanan, defendant, a manifest error has happened, to the great prejudice of said plaintiff, the United States of America, as is said and appears by the petition herein,

We, being willing that errors, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Supreme Court in the city of Washington, D. C., together with this writ, so as to have the same at said place on the 25th day of April, 1913, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 26th day of March, 1913.

Attest my hand and seal of the United States District Court for the District of Colorado, at the clerk's office at Denver, Colorado, on the day and year last above written.

[SEAL.] CHARLES W. BISHOP,
Clerk U. S. District Court for the District of Colorado.

Allowed this 26th day of March, 1913.

ROBT. E. LEWIS,
Judge of the United States District Court
for the District of Colorado.

27 UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I do hereunto sign my name and affix the seal of the District Court of the United States for the District of Colorado at the city and county of Denver in said district this seventh day of April, A. D. 1913.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

28 (Indorsed:) No. 2665. United States District Court, District of Colorado. The United States of America *v.* Eugene Buchanan, defendant. Writ of error. Filed Mar. 26, 1913. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

29 UNITED STATES OF AMERICA, *ss:*

To Eugene Buchanan, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the District of Colorado, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, this 26th day of March, A. D. 1913.

ROBT. E. LEWIS, *District Judge.*

On this 26th day of March, 1913, personally appeared before me J. F. Parrish and makes oath that he delivered a true copy of the within citation to Charles W. Waterman, attorney for defendant.

JNO. F. PARRISH.

Subscribed and sworn to before me this 26th day of March, A. D. 1913.

[SEAL.] CHARLES W. BISHOP, *Clerk.*
By ALBERT TRICO, *Deputy Clerk.*

I hereby acknowledge due and lawful service upon me of the above citation, on this 26th day of March, A. D. 1913.

EUGENE BUCHANAN,
By CHARLES W. WATERMAN, *Attorney.*

I do hereby certify that I have been retained by, and appear in the above-entitled cause, for and in behalf of the defendant, Eugene Buchanan.

CHARLES W. WATERMAN.

DENVER, COLO., *April 12, 1913.*

30 (Indorsed:) No. 2065. United States District Court, District of Colorado. The United States of America v. Eugene Buchanan, defendant. Citation. Filed Mar. 26, 1913. Charles W. Bishop, clerk. Harry E. Kelly, U. S. attorney.

31 UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the District Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to twenty-five (25), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, bill of exceptions, assignment of errors, and all proceedings in the case, as directed in the precipe filed herein, together with a true copy of such precipe, heretofore filed or entered of record in said court and in a certain case lately in said court pending between the United States of America and Eugene Buchanan, as fully and completely as the same still remain on file and of record in my office at Denver.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at the city and county of Denver, in said district, seventh day of April, A. D. 1913.

[SEAL.] CHARLES W. BISHOP, *Clerk.*

32 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States within and for the District of Colorado.

No. 2665.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EUGENE BUCHANAN, DEFENDANT.

This is a demurrer to an indictment found and returned under section 3 of the act of February 25, 1885 (23 Stat., 322). The indictment sets forth that Edward Scott made homestead entry to a quarter section of land on February 23rd, 1907, and that thereafter and on March 28th, 1910, said entryman died, leaving as his only heirs James H. Scott and Martha E. Scott, who became vested with all the right and interest in Edward Scott at the time of his death to said entry, which was then in full force and effect, and that thereafter at all times mentioned in the indictment the said heirs were in lawful possession of and engaged in cultivating the said homestead land for the purpose of protecting their right to the same under the laws of the United States as heirs of the homesteader.

The indictment then charges that the defendant, Eugene
33 Buchanan, on the 1st day of May, 1911, did wilfully, wickedly, unlawfully, and feloniously prevent and obstruct said heirs, James H. and Martha E. Scott, from peaceably entering upon and establishing a settlement and residence on the said homesteaded land, by going on said homesteaded land with force and arms and driving therefrom the tenants of the said heirs lawfully thereon, and tearing down, destroying, and carrying away the buildings and other improvements thereon, the said buildings and other improvements being then and there attached to and a part of the said homesteaded land.

It thus appears upon the face of the indictment that the acts charged against the defendant as constituting the criminal offence were perpetrated and occurred long after the homestead entry had been made and accepted at the land office, the entryman had initiated settlement and established his residence on the land, and his heirs after his death had likewise established their residence on the land under a right in them initiated by him. I am of the opinion that the acts so charged against the defendant do not constitute the criminal offense defined in section 3 of said act, for the reason that said act and section 3 thereof, as construed by the court, do not apply to or embrace the acts charged against the defendant and committed after the homesteader has made his entry, initiated settlement, and established his residence on the lands.

34 These were the views expressed by the court at the time the demurrer was argued and on which it was sustained and the

defendant discharged. They are now put in writing and filed in the case at the request of the district attorney.

ROBT. E. LEWIS, *District Judge.*

Dated May 23d, 1913.

(Endorsed:) 2665. U. S. District Court, District of Colorado, United States of America vs. Eugene Buchanan. Opinion: Lewis, D. J., on sustaining demurrer to indictment. Filed May 23, 1913. Charles W. Bishop, clerk.

A true copy.
Teste:

CHARLES W. BISHOP, *Clerk.*
By ALBERT TEDCO, *Deputy Clerk.*

(Indorsement on cover:) File No. 23,738. Colorado D. C. U. S. Term No. 589. The United States, plaintiff in error, vs. Eugene Buchanan. Filed June 7th, 1913. File No. 23,738.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
EUGENE BUCHANAN, DEFENADNT IN ERROR.
} No. 1163.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

MOTION BY THE UNITED STATES TO ADVANCE.

The Attorney General, on behalf of the United States, moves that this case be advanced for early hearing, since it is here under the Criminal Appeals Act; and that it be placed on the summary docket, as the question involved is simple.

The defendant was indicted for preventing and obstructing the heirs of a deceased homestead entryman from peaceably entering upon and establishing a settlement and residence upon homesteaded land of the United States by going on said land with force and arms and driving therefrom the tenants of the said heirs, and by tearing down, destroying, and carrying away the buildings and other improvements upon said land.

The indictment was based upon section 3 of the act of February 25, 1885 (23 Stats., 321), which makes it an offense for any person by force, threats intimidation, or any other unlawful means, to prevent, obstruct, or to combine or confederate with others to prevent or obstruct any person from peacefully entering upon or establishing a settlement and residence on any tract of public land subject to settlement or entry under the public land laws of the United States.

A demurrer was filed and sustained upon the ground that said act as construed by the court does not apply to lands embraced in an existing homestead entry in the possession of the heirs of the deceased homesteader who are seeking to perfect title under the homestead laws.

Opposing counsel concur in this motion.

J. C. McREYNOLDS,
Attorney General.

ERNEST KNAEBEL,
Assistant Attorney General.

June 9, 1913.

○

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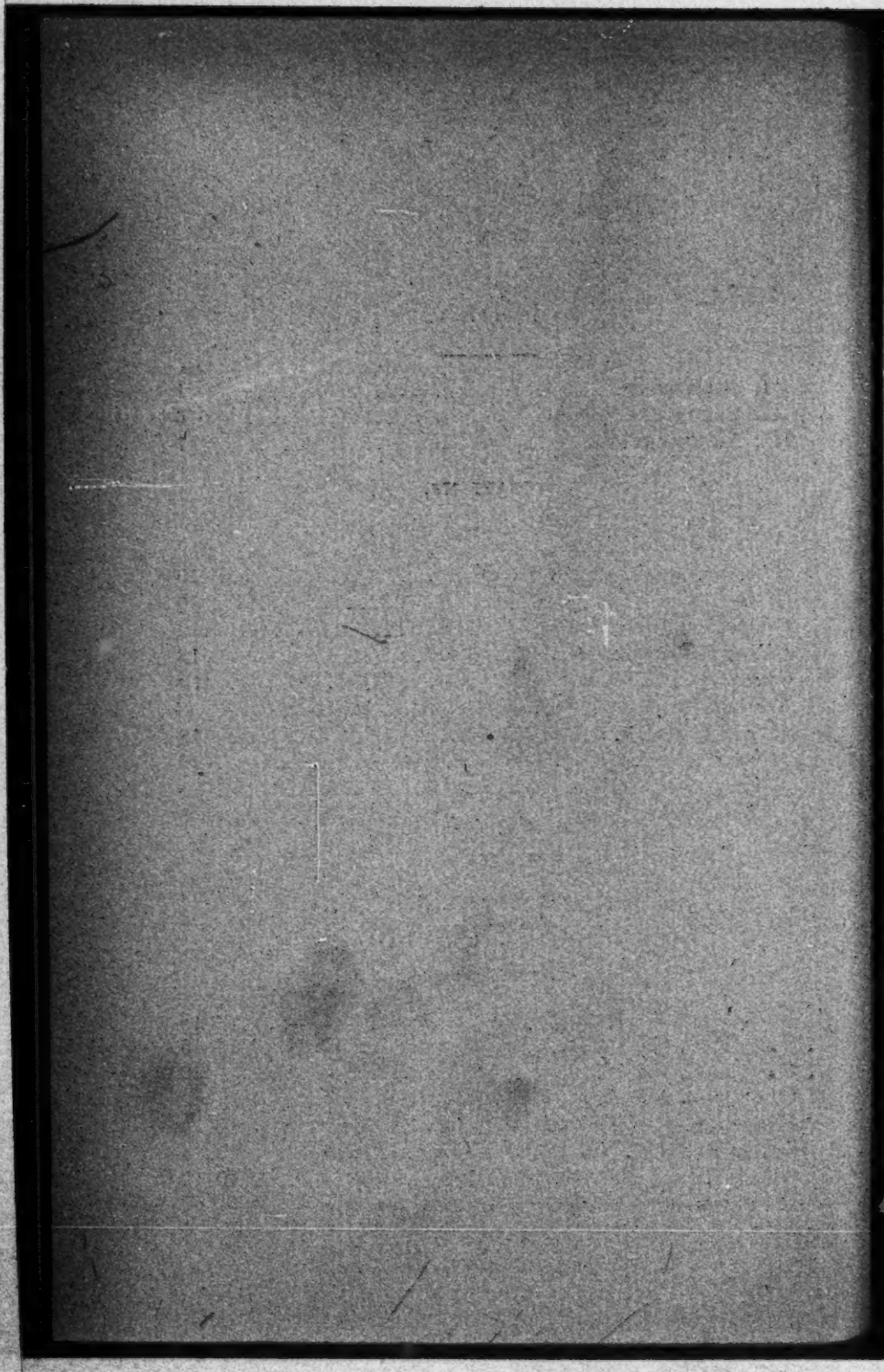

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF in error, v. EUGENE BUCHANAN. } No. 589.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

This case is brought here under the Criminal Appeals Act. The defendant was indicted for preventing and obstructing the heirs of a deceased homestead entryman from "entering upon and establishing a settlement and residence" on a tract of public land, the indictment being based upon the third section of the act of February 25, 1885 (23 Stat., 321). That act reads as follows:

An act to prevent unlawful occupancy of the public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all inclosures of any public lands in any State or Territory of

the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name can not on reasonable inquiry be ascertained, to institute a civil

suit in the proper United States district or circuit court, or Territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district or circuit court or Territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a set-

tlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

SEC. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offence.

SEC. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

SEC. 6. That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

SEC. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.

The contents of the indictment, as construed by the court below, may best be expressed in the court's own language from its written opinion (R., 15), viz:

> The indictment sets forth that Edward Scott made homestead entry to a quarter section of land on February 23rd, 1907, and that thereafter and on March 28th, 1910, said entryman died, leaving as his only heirs James H. Scott and Martha E. Scott, who became vested with all the right and interest in Edward Scott at the time of his death to said entry, which was then in full force and effect, and that thereafter at all times mentioned in the indictment the said heirs were in lawful possession of and engaged in cultivating the said homestead land for the purpose of protecting their right to the same under the laws of the United States as heirs of the homesteader.
>
> The indictment then charges that the defendant, Eugene Buchanan, on the 1st day of May, 1911, did wilfully, wickedly, unlawfully, and feloniously prevent and obstruct said heirs, James H. and Martha E. Scott, from peaceably entering upon and establishing a settlement and residence on the said homesteaded land, by going on said homesteaded land with force and arms and driving therefrom the tenants of the said heirs lawfully thereon, and tearing down, destroying, and carrying away the buildings and other improvements thereon, the said buildings and other improvements being then and there attached to and a part of the said homesteaded land.

A lengthy demurrer was interposed (R., 4 to 7), specifying 19 enumerated grounds of objection to the

indictment, most of which respect its form and sufficiency as a pleading. The case, however, was disposed of solely upon a construction of the third section of the statute. The nature and purport of the ruling are clearly revealed by the following excerpts from the opinion:

> It thus appears upon the face of the indictment that the acts charged against the defendant as constituting the criminal offence were perpetrated and occurred long after the homestead entry had been made and accepted at the land office, the entryman had initiated settlement and established his residence on the land, and his heirs after his death had likewise established their residence on the land under a right in them initiated by him. I am of the opinion that the acts so charged against the defendant do not constitute the criminal offense defined in section 3 of said act, for the reason that said act and section 3 thereof, as construed by the court, do not apply to or embrace the acts charged against the defendant and committed after the homesteader has made his entry, initiated settlement, and established his residence on the lands.

It is believed that the third section of the act was intended for the protection of the right of a homestead claimant to continue his settlement and residence throughout the period required by the homestead law, no less than for the protection of his right to initiate settlement and residence; and the ruling of the trial court to the contrary is assigned and relied upon as error.

ARGUMENT.

The statute forbade the defendant "by force, threats, intimidation, or by any fencing or inclosing, *or any other unlawful means*," to "*prevent or obstruct* any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States."

The indictment charges that the defendant did "*prevent and obstruct* them, the said heirs, James H. Scott and Martha E. Scott, from peaceably entering upon and establishing a settlement and residence on the said homesteaded land * * * by going upon said homesteaded land with force and arms and driving therefrom the tenants of the said heirs lawfully thereon and tearing down, destroying, and carrying away the buildings and other improvements thereon, * * * then and there attached to and a part of the said homestead land."

There can be no doubt that such violent, destructive, and altogether outrageous acts as these done, as the indictment says they were done, "wilfully, wickedly, unlawfully, and feloniously," come within the denunciation of the statute, provided the rights of the persons afflicted were such as the statute designs to protect.

Section 2291 of the Revised Statutes, referring to homestead entries, provides:

> No certificate, however, shall be given, or patent issued therefor, until the expiration of

five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

By force of this provision the two heirs stepped into the rights of the entryman. The law promised them the fee if they would reside on and cultivate the land until the expiration of five years from the date of the entry.[1]

[1] It should be remarked here that in such cases *either* residence or cultivation is deemed sufficient by the Department of the Interior. (*Heirs of Stevenson* v. *Cunningham*, 32 L. D., 650; *sed. cf. United States* v. *Mills*, 190 Fed., 513; *United States* v. *Perry*, 45 Fed., 759.) However this may be, it is plain that the claimants in this case, at the time when the defendant intervened and deprived them of their buildings and other improvements, were entitled to continue the settlement and residence which their ancestor had initiated. The fact that there were tenants on the premises is immaterial. The indictment does not disclose the character of the tenancy; but, even assuming that it was not authorised by the homestead law, the irregularity could not avail the defendant in this proceeding. Under the ruling of the Land Department above cited, the claimants would doubtless have the right to cultivate through tenants. If their actual residence on the land had been interrupted in this way, they would be entitled to resume it.

The court makes no point of the fact that the claimants in this case did not originate the entry. The decision would have been the same if the defendant had been charged with destroying the home of the original homestead settler and with driving him from his claim, provided it appeared that these acts of violence and brutality occurred as much as one moment after his settlement and residence began. In other words, in the opinion of the court, the statute is designed to protect the settler in the initial stages only, and leaves him without protection throughout the five years of settlement and residence which must follow before he can become the owner of the land. It is submitted that such a distinction would be a most remarkable and unreasonable one for Congress to make, and that no sufficient basis for it is to be discovered in either the spirit or the letter of the act.

Reading the act as a whole, in the light of its history, one will not hesitate to concede that the principal evil which was *immediately* aimed at was the unlawful inclosures of the public domain, which were erected and maintained upon an enormous scale by cattle raisers in the West. But the underlying purpose struck deeper than the mere vindication of the technical proprietary rights of the Government. The inclosures were deemed gravely obnoxious, not so much because they were unauthorized as because of their results. One of these was interference with the right of pasturage, common to all

citizens (*Buford* v. *Houtz*, 133 U. S., 320); another, and by far the most serious, was obstruction of the homestead policy. It is not too much to affirm that, beyond all else, it was to protect and effectuate that policy that this law was enacted. This fact was recognized by the court in *Cameron* v. *United States*, 148 U. S., 301, 305, where it is said that the act was passed to prevent the practice of inclosing lands, "by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats of violence." See, also, *Camfield* v. *United States*, 167 U. S., 518, 524. Also *Golconda Cattle Co.* v. *United States* (C. C. A., 9th Cir.), 201 Fed., 281, in which a rehearing has been granted. In these cases the court was not called upon to consider whether actual as well as prospective settlers were intended to be protected, but the proceedings in Congress, and the facts before it when the bill was introduced and passed, demonstrate that they were. (See House Report No. 1325, 48th Cong., 1st sess.; Senate Report No. 979, 48th Cong., 2d sess.; Senate Ex. Doc. No. 127, 48th Cong., 1st sess.; Cong. Rec., vol. 15, pt. 5, pp. 4768–4783; *Id.*, vol. 16, pt. 1, p. 622; *Id.*, vol. 16, pt. 2, pp. 1456, 1478.)

It is significant that the bill, upon first being reported to the House, was taken up and passed, out of its regular order, upon the ground that it was privileged under a resolution which, among other things, had declared the sense of the House that public land "ought to be reserved for the benefit of actual and

bona fide settlers, and disposed of under the provisions of the homestead laws only." (Cong. Rec., vol. 15, pt. 5, pp. 4668–4771.) After there had been some debate on this subject, the Speaker ruled as follows (*Id.*, p. 4771):

> The fact that there may be unlawful occupancy is enough to determine the character of the bill.
>
> The resolution of the House, as the Chair has already said, relates to three subjects:
>
> First. The forfeiture of land grants to railroad companies.
>
> Second. Prohibitions of speculation in large bodies of public lands.
>
> Third. The preservation of the public lands for the use of actual settlers under the "homestead laws only."
>
> That is the language of the resolutions.
>
> There are two ways in which title to public lands can be acquired only by actual possession and occupancy: First, under preemption laws; and, secondly, under the homestead laws; so that if there is now existing, or may hereafter exist, any condition of affairs in relation to public lands which would prevent citizens from obtaining title as actual *bona fide* owners and occupants under these laws, the Chair thinks a bill the object of which is to remove those obstructions and enable the people *to obtain title* under those laws would be privileged under the resolution adopted by the House.
>
> The resolutions are very comprehensive, and the fourth, which relates to the privilege, provides that the Committee on the Public

> Lands is "hereby instructed to report to the House bills to carry into effect the views expressed in the foregoing resolutions."
>
> The Chair thinks, therefore, this bill, having for its object the removal of existing obstructions or the prevention of all obstructions in the future, and thus enabling the people to *secure* possession and occupancy of public lands by persons who desire to acquire title under the homestead and preemption laws, comes within the privilege, and is in order.

The documents above cited contain voluminous communications from the Secretary of the Interior, the Commissioner of the General Land Office, other Government officials and private persons, throughout which it is apparent that the rights of settlers *actual as well as intending*, were seriously interfered with, not only by the inclosures themselves, but also by the threats and violence of those who sought to control public land for grazing. The reports and debates indicate that this was deemed the most serious of the evils to be overcome.

The following is from the House Report (*supra*), page 6:

> These inclosures are generally made of barbed wire, and by many of them mail routes are closed, and settlement by citizens under the homestead and preemption laws is prevented.
>
> Not only so, but in numerous instances citizens *who have made settlement* under the existing laws of the United States *are first inclosed*,

and then driven off their little holdings, and *their improvements appropriated* by the parties making the inclosures.

Attention is called to Senate Executive Document 127, first session Forty-eighth Congress, for details of this monstrous evil.

The following is from the Senate Report (*supra*), page 1:

> The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the Government, large, and oftentimes foreign, corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such inclosures are open to settlement, yet no humble settler, with scarcely the means for the necessaries of life, would presume to enter any such inclosure to seek a home.

Explaining the bill to the House, Mr. Payson, who was in charge of it, said:

> And as to this very land this report shows and the public records of the country show that American citizens when desiring to preempt or make homestead claims upon this land are run off with shotguns and rifles. *It is to open this land up to sale and settlement that this bill is introduced.* (15 Cong. Rec., pt. 5, p. 4769.)

> Letter after letter has come to the Committee on the Public Lands of this House since we have been investigating this question where people are making complaints that in going out there to settle down and take up a homestead claim they are met with these barbed-wire fences and driven off by force by the retainers of these corporations. (*Id.*, p. 4771.)

After reading a letter showing that a preemptioner in Colorado had been fired upon while making improvements on his claim, Mr. Payson, referring to Senate Document No. 127, *supra*, continued:

> Not only so, Mr. Speaker, but this document to which I have called attention here will show instances of similar charges which have occurred, and even charges of greater enormity are recorded. I call attention, sir, to a letter written in September last, which is quoted in these documents by a gentleman living in Custer County, Nebraska, where he says *his house has been burnt* by the employes of these men in order to *drive him off of his homestead*.
>
> His place was inclosed by a line of barbed-wire fence put up by these corporations, and when he declined to leave his property the house was burned over his head. *Instances without number* could be given here of interference by these people with *similar* rights of the homesteaders. (*Id.*, pp. 4771, 4772.)

Mr. Springer said:

> If there is power enough in this Government to protect our public domain, and honest

> actual settlers on it, this House ought to invoke that power. This bill is in that direction, and for that reason I hope it will pass the House and become a law. If its provisions are not strong enough I hope it will be supplemented by such amendments as will make it effective. (*Id.*, p. 4774.)

The italics appearing in these quotations are ours. Many extracts to the same effect might be added, but enough have been given to demonstrate, first, that the purpose of the enactment was largely, if not primarily, to prevent all interference with homestead settlement, and, second, that in the evils which stood revealed to Congress and in the exegesis of this measure made by those who were charged with the duty of explaining it, there is nothing whatever to justify the trial court's distinction between interference with the initiation and interference with the subsequent maintenance of settlement and residence. Indeed, these quotations show that cases of the latter sort were invoked with special emphasis as demanding the legislation. The House report speaks of numerous instances in which citizens who made settlement were driven from their buildings and deprived of their improvements. The chairman of the Public Lands Committee refers to them as "instances without number." It is precisely such an instance that the indictment in this case describes. Under the circumstances, it is impossible to believe that Congress could have intended to ignore these particularly flagrant cases. Not only does the

record of its proceedings forbid such an inference, but the thought is inconsistent with the purpose of the act as displayed upon its face, besides being essentially absurd. The act manifestly intends to promote the settlement of the country. To this end it removes fences and guarantees safety to the citizen in seeking his new home and in passing to and from it over the public lands after he has made it. But, according to the decision of the court below, it stops there. The man who has made his entry, built his house, installed his family, and staked his fortune, must henceforth look to himself for protection. Though the statute will guard him if he steps off his holding to pass over the public domain, it will not save him from expulsion or from the destruction of all that his labor and investments have produced! It seems too clear for argument that if protection be needed to encourage settlement, it is more important that it should be afforded after homes have been established than before. It is of little avail to assist the settler to go upon the land if he may be expelled with impunity immediately afterwards.

Judging by the opinion, the trial court must have read the word "establishing" in the third section as though its only meaning were "initiating." This is an erroneous assumption; but, even if it were correct, it would not justify the narrow construction of the section which the court adopted, since the evident spirit and purpose of a statute, penal or otherwise, is not to be strangled to satisfy the bare letter of a single word. See *United States* v. *Lacher*, 134 U. S.,

624, 629, in which the opinion quotes with approval the following from Sedgwick on Statutory and Constitutional Law:

> The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope.

Assume that the word "initiating" had actually been used instead of the word "establishing," in the third section. Clearly a reasonable interpretation of it, in view of the purpose of the statute as a whole, would extend its meaning to include the act of a settler in beginning his settlement and residence anew after a wrongful expulsion. If his settlement and residence were interrupted, a return to them would be, in a proper sense, the initiation of settlement and residence, and destruction of his improvements in the interim would constitute such an obstruction as the section forbids. It would be the merest trifling, then, to say that the act of expelling him forcibly, or rendering his position untenable by

threats or destruction of improvements, did not fall within the fair intendment of the prohibition.

The construction is even clearer when we take the statute as it is. The ordinary meaning of "establish," as indicated by the derivation and defined by all lexicographers is "to make stable and firm," "to settle unalterably." Black, in his Law Dictionary, says (p. 438):

> This word occurs frequently in the Constitution of the United States, and it is there used in different meanings: (1) To settle firmly, to fix unalterably; as to establish justice, which is the avowed object of the Constitution. (2) To make or form; as to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, which evidently does not mean that these laws shall be unalterably established as justice. (3) To found, to create, to regulate; as: "Congress shall have power to establish post-roads and post-offices." (4) To found, recognize, confirm, or admit; as: "Congress shall make no law respecting an establishment of religion." (5) To create, to ratify, or confirm; as: "We, the people," etc., "do ordain and establish this Constitution."

In *Dickey* v. *Turnpike Co.*, 37 Ky., 113, 127, the court says: "To establish a post road, in the most restricted sense, is to designate, *keep* and *preserve* such roads for post roads as the public good shall require." The italics are the court's.

In *State* v. *Rogers*, 107 Ala., 444, in which it was held that the title of a statute, viz, "To establish a

board of revenue," sufficiently expressed its purpose, which was to provide for the reconstruction of the board already existing, the court said, at page 453:

> The insistence hinges on the use of the word *establish*, which seems to be supposed incapable of proper use when employed in this connection, or of any other signification than to found and set up; yet, it is as often employed, to signify the putting or fixing on a firm basis, of putting in a settled or an efficient state or condition, an existing legal organization or institution, as it is to found or set up such organization or institution; the one meaning is as little recondite, abstruse, or obscure as the other.

"Initiate" and "begin" denote the taking of the first step in some process requiring more for its accomplishment. The word "establish," on the other hand, looks to the completion and confirmation of the thing to be accomplished. What it may imply, then, in a given case, depends upon the content of the term which it governs as an object. It might not be easy to define exactly what is meant by "settlement" and "residence" in the statute, and it is unnecessary to make the attempt. As factors in a full compliance with the homestead law, both settlement and residence possess an element of continuity. A man may begin his settlement (using the word in its active sense, and not as denoting merely the physical results of settlement, such as buildings, fences, plowed fields, etc.), and he may abandon it, and he may maintain it. The same is true of his residence. If

one has in mind only the acts and intent which go to initiate a residence, doubtless it is proper to say that the residence is thereby established. But when one conceives of residence as a status, to be not merely begun, but to be maintained, for a definite legal purpose—like the earning of the homestead title—those acts and things which go to confirm and fortify this status may properly be recognized as acts and things for its establishment. For instance, a suitable dwelling house may be necessary to enable a settler to maintain his settlement and residence during the five-year period. In building such a house, and in repairing it, and in rebuilding it when it has been destroyed, he is fortifying his settlement and residence under the homestead law; that is to say, he is engaged in the process of "establishing" them.

It is respectfully submitted that the judgment of the court below should be reversed.

ERNEST KNAEBEL,
Assistant Attorney General.
S. W. WILLIAMS,
Attorney in the Department of Justice.

NOVEMBER, 1913.

O

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

NO. 589.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EUGENE BUCHANAN.

IN ERROR OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

1 This case was numbered 2665 in the District Court of the United States, for the District of Colorado, sitting at Denver; the indictment is in one count, and is based upon the provisions of section 3, of 23 U. S. Statutes at Large, p. 322, prohibiting any person from preventing or obstructing by force, threats, intimidation, or by any fencing or enclosing, or any unlawful means, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws. The statute is as follows:

> "Sec. 3. That no person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct and person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: **Provided**, This section shall not be held to effect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith."

To this indictment the defendant in error interposed a demurrer, as set forth in Transcript of Record, Pages 4, 5, 6, & 7, (folios 7 to 17). This demurrer was sustained by the learned District Judge, (folio 17, Page 18, Transcript of Record); in sustaining the demurrer to the indictment, the learned District Judge gave his opinion, (folios 32 to 35, Pages 15 and 16, Transcript of Record).

2 The first, second, third and fourth grounds of the demurrer to the indictment, (folios 7 and 8, Page 4), are

in general terms, and are more particularly covered by the subsequent specific grounds set forth in the demurrer.

3 The fifth ground of the demurrer to the indictment is based upon the proposition that the indictment fails to charge any fact or facts from which it would appear as a matter of law that James H. Scott and Martha E. Scott, or either of them, were or are the heirs at law of Edward Scott, the alleged entryman. The indictment merely alleges that James H. Scott and Martha E. Scott, his wife, were "heirs at law of one Edward Scott." This allegation is merely a legal conclusion, and insufficient to constitute an allegation of the ultimate fact of heirship. The facts relied upon to establish the heirship must be alleged.

12 Enc. of Pl. & Pr. p. 1042.
Fite v. Orr, 1 S. W., 582;
Reiners v. Brandhorst, 59 How. Pr. 91;
Larue v. Hays, 7 Bush. (Ky). 50;
Kerlee v. Carpening, 97 N. Car. 334; 2 S. E. 664;
Craig v. Cole Co., 73 S. W. 1035; 74 S. W. 1097;
Buttes v. DeBaun, 116 Wis. 323; 93 N. W. 5;
Dailey v. O'Brien, 96 S. W. 521;
Moser v. Talman, 100 N. Y. Suppl. 231;
Cohen v. Doran, 51 So. 282;
Heaton v. Buhler, 127 S. W. 1078;

4 The sixth and seventh grounds of the demurrer are predicated upon the proposition that the indictment fails to allege that James H. Scott and Martha E. Scott were citizens of the United States, or otherwise qualified to homestead said lands at any of the times mentioned in said indictment; Section 2291, U. S. Revised Statutes vests in the widow of a deceased entryman, or, in case of her death in his heirs or devisees, the right to mature title to and secure patent for the homestead entry. This statute required final proof establishing residence upon or cultivation of the homestead, in which

event "He, she or they, if at that time citizens of the United States shall be entitled to a patent as in other cases provided by law." The alien heirs of a deceased entryman are incompetent to make final proof.

Agnew v. Morton, 13 L. D. 228;
Patten v. Katz, 26 L. D., 317.

5 The eighth ground of the demurrer is predicated upon the proposition that the indictment fails to charge that the land described therein was public land subject to settlement or entry, under the public land laws of the United States. This was the ground upon which the learned District Judge sustained the demurrer. An indictment, to be good under Section 3, of 23 U. S. Statutes at Large, p. 321 must state that the lands upon which entry is prevented is public land of the United States and subject to entry and settlement as such.

Haynes v. U. S., 101 U. S. 817, at p. 819;

The policy of the United States Government with respect to public lands has been a liberal one, toward keeping the public lands open for grazing or use of the public generally, and would not permit these lands to be controlled exclusively for the benefit of any person or corporation, as against the public at large;

Buford v. Houtz, 133 U. S. p. 320;

The purpose of the Act of February 25, 1885, under Section 3 of which this indictment is brought, is to keep the public lands open and to carry out the liberal policy of the government in respect thereto, hence any indictment framed under Section 3, must relate wholly to the public lands of the United States, and not to lands that have been entered or are not at the time of the commission of the offense charged, open to en-

try or settlement under the public land laws of the United States;

The indictment reads in part, (Transcript of Record folios 3 and 4):

> "Which said homestead entry had been made by him the said Edward Scott, at the United States Land Office at Sterling, in the State of Colorado, on, to-wit, the twenty-third day of February, in the year of our Lord One Thousand Nine Hundred and Seven, he, the said Edward Scott then and there being a citizen of the United States and duly qualified to make said homestead entry, and which said homestead entry was in full force and effect at the said date of the death of the said entryman, as aforesaid, and thereafter at all times mentioned in this indictment the said heirs were in lawful possession of and were engaged in cultivating the said homestead land, as aforesaid."

which shows upon the face of the indictment that the lands concerning which the offense is charged were not government lands open to entry or settlement, and that the acts charged against the defendant Buchanan did not hinder James H. Scott and Martha E. Scott from peaceably entering upon and establishing settlement and residence upon public land, and did not prevent the tenants of the said James H. Scott and Martha E. Scott from entering upon any part of the public domain.

We think the opinion of the learned district judge was eminently correct in this respect, and that in order to charge an offense under this section of the statute it is necessary to allege that the acts complained of prevented an entry or settlement upon public lands, and that where they show upon the face of the indictment that the lands were not public lands but had been entered by another, and were in the peaceable pos-

session of the entryman and his heirs, any violation of this right of possession would not come under this statute, but would be covered by the statutes of the state or territory in which such acts took place.

6 The ninth, tenth and eleventh grounds of the demurrer are based upon the proposition that the indictment fails to charge any ultimate facts from which it would appear that the entryman at any time resided upon and cultivated said land as a homestead, in accordance with the United States homestead laws, or from which it would otherwise appear "that said homestead entry was in full force and effect," at the date of the death of the said alleged entryman. The allegation that the homestead entry was in full force and effect is but a legal conclusion.

7 The twelfth ground for the demurrer is not now urged by the defendant in error, and is abandoned by him.

8 The thirteenth ground of the demurrer is that the indictment fails to charge any fact or facts from which it would appear that the defendant, by any unlawful means, did prevent or obstruct said alleged heirs from peaceably entering upon or establishing a settlement or residence upon said land. The indictment charges that at all times after the death of the entryman, the "said heirs were in lawful possession of and were engaged in cultivating the said homestead land as aforesaid, for the purpose of protecting their right to the same under the laws of the United States, as heirs to said homesteader."

Nowhere does the indictment charge that the said heirs had ever entered upon or established a settlement or residence upon the said homestead. In fact it was not necessary for the alleged heirs to actually reside upon the homestead in order to obtain title thereto. Under Section 2291 U. S. Revised Statutes, they might either reside upon or cultivate the land.

The act has reference to a settlement upon public lands.

The term settlement means personal residence upon and occupation of the land;

Burleson v. Durham, 46 Tex. 152, 160;
Zabler v. Schrack, 46 Penn. St., 67, 70;
Perkins v. Miller, 60 Tex. 61, 63;
Jacobs v. Fogard, 25 Penn. St., 45, 47;
Bixler v. Baker, 4 Bin. (pa). 213, 217;

9 The fourteenth, fifteenth, sixteenth and seventeenth grounds of the demurrer are based upon the proposition that the acts of the defendant charged in the indictment failed to establish that the defendant by any unlawful means, did prevent or obstruct the alleged heirs from peaceably entering upon or establishing a settlement or residence upon said homestead.

The only acts charged by which it is alleged that the alleged heirs were prevented and obstructed from so establishing a settlement or residence on said homestead were, first, the act of going on said homestead land with force and arms and driving the tenants of the alleged heirs from the said homestead; and, second, the act of destroying and carrying away the buildings and other improvements thereon.

The indictment fails to charge that the alleged tenants of the alleged heirs were upon the homestead for the purpose of entering the same or establishing a settlement or residence on said land for or on behalf of said heirs, or that said alleged tenants were residing upon said land or cultivating said land, or otherwise upon said land for the purpose of protecting the alleged rights of the alleged heirs in and to said homestead, or otherwise. How, therefore, can it be said that the act of driving these tenants from the homestead in any wise prevented or obstructed the alleged heirs in peaceably entering upon or establishing a settlement or residence upon said homestead;

Furthermore, as a matter of law, the alleged tenants of the

alleged heirs could not establish a settlement or residence on said land for or in behalf of the alleged heirs, or otherwise cultivate or reside upon said homestead for the purpose of perfecting the title to said homestead for and on behalf of the alleged heirs. A tenant is a person having some estate in the premises occupied. A servant or agent of the owner of the premises cannot in law be considered as a tenant.

Presley v. Benjamin, 169 N. Y., 377; 62 N. E. 430;
People v. Ambrecht, 11 Abbott's Pr. (N. Y.) 101;

Therefore, the parties alleged to have been driven from the premises being tenants, they could not have been the servants or agents of the alleged heirs for any purpose, and the residence, occupancy or cultivation of such homestead by such tenants could not in law constitute residence or cultivation by the alleged heirs.

Furthermore, it was held by the Circuit Court of Appeals for the Eighth Circuit, in the case of Ware v. U. S., 154 Fed. 577, 584, to be unlawful for an entryman to lease a homestead prior to the time of obtaining patent thereto, and inasmuch as it was unlawful for the alleged heirs to lease the homestead to these tenants alleged to have been driven therefrom by the defendant, clearly it cannot be said that the act of driving such tenants from the homestead in any wise prevented or obstructed the alleged heirs from peaceably entering upon or establishing a settlement or residence on such homestead.

Furthermore, the indictment fails to charge any fact or facts from which it would appear that the defendant was not entitled to tear down and carry away the buildings and improvements upon the land, or that such act was unlawful. It is established by the great weight of authority that the owner of improvements upon public lands may remove the same, though having no interest in such lands;

It has been held by the courts of a number of states that

the owner of improvements upon public lands may remove the same, though having no interest in such lands:

32 Cyc. 1017;
26 Am. & Eng. Ency. of Law, p. 255;
Walbrecht v. Blush, 43 Colo. 329;
Winans v. Beidler, 52 Pac. 405;
Bingham County Agricultural Association v. Rogers, 59 Pac. p. 931;
Richardson v. Bohney, 114 Pac. 42;
Crocker v. Donovan, 30 Pac. 374, 376;
In re Catherine Milne, 9 L. D. 529;
Wheeler v. Rodgers, 28 L. D. 250;

10 The eighteenth and nineteenth grounds of the demurrer are based upon the proposition that the indictment fails to charge that the alleged acts of the defendant were done or committed by defendant without claiming title to said land or said buildings and improvements in good faith; the act on which the indictment is sought to be founded expressly provides that Section 3 shall not be held to effect the right or title of persons who have gone upon, improved or occupied lands under the public land laws of the United States claiming title thereto in good faith, and it has been held that an indictment under this section must allege that the defendant committed the acts in violation of the statute without claim or color of title to the property;

U. S. v. Churchill, 101 Fed. 443;
Lillis v. U. S. 190 Fed. 530, 534;
U. S. v. Felderward, 36 Fed. 490.

There is but one specification of error in the assignment and it is to the effect that the decision of the learned district judge misinterpreted the law. The interpretation placed upon Section 3, 23 U. S. Statutes at Large, p. 321 by the district court is that it does not apply to cases where the entry of public

lands has been regularly made at the Land Office, and the entryman has entered into possession and established residence and cultivation upon the lands, but is intended as a protection to persons desiring to enter upon the public lands of the United States for the purpose of entering the same, prospecting for minerals, or other lawful business thereon, and it seems to us that Judge Lewis merely followed the weight of authorities in interpreting the statute, and that this statute was not intended to reach such acts as are charged in the indictment in this case.

We believe that the indictment does not state facts sufficient to constitute a crime under said Section 3, and that the opinion of the learned district judge in sustaining the demurrer is right and just under the law, and respectfully ask that the opinion be affirmed by this Honorable Court.

C. W. WATERMAN,
Attorney for Defendant in Error.

S. E. NAUGLE,
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 589.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EUGENE BUCHANAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

SUPPLEMENTAL BRIEF FOR THE DEFENDANT IN ERROR, FILED BY LEAVE OF COURT.

The contention of the plaintiff in error is that the district court misconstrued the law (act of February 25, 1885, 23 Stat., 321) in sustaining the demurrer to the indictment, and has assigned this only as the error relied upon in this court.

To sustain this contention the able Assistant Attorney-General argues that:

1st. The history of the act gives it a greater scope than the language of act imports; that while it *immediately aimed at unlawful enclosures of the public domain, its deeper purpose was to protect settlers on the public lands.*

2d. The statute should be construed as extending the application of the act to the entire period of homestead residence and settlement up to the time patent issues in order that the deeper purpose of act as suggested by its history may be carried into effect.

Therefore we inquire, first, can the history of the act widen its scope beyond its plain provisions?

Granting that the records show innumerable depredations on homesteaders and that large tracts of the public domain were appropriated by means of unlawful enclosures to private enterprises, and that the record is full of letters and statements to this effect, we must still look to the act itself to find the scope it was intended to cover, and if it there appears sufficiently clear as to what was intended by the legislature we must accept it as it is, and not resort to its history for a possible meaning, not suggested or expressed by the enactment itself and beyond the scope of its contents. Many things fill the records of legislative enactment that are not germane to the acts passed.

The history of the act and the incidents leading to its enactment are well reviewed in the Golconda Cattle Company case, where it is said:

> "In time, however, dissatisfaction with such *unlawful occupancy* became widespread in the Western States, and in 1885 Congress, in order to protect the public domain, considered as a remedial measure the law herein."
>
> Golconda Cattle Co. vs. U. S., 201 Fed., 281-285.

The title of the act is suggestive, and should control the scope of the legislative intent. It is clear, unequivocal, and can have but one meaning:

"An act to prevent unlawful occupancy of the public lands."

Section 1 relates wholly to occupancy of public lands by certain enclosures, and declares such enclosures unlawful, except under conditions where the land occupied is claimed under some color of title or asserted right.

Section 2 provides a remedy, summary in character.

Section 3 relates to the occupancy of public land by force, threats, intimidation, or by fencing or enclosing, or other unlawful means, whereby others are prevented or obstructed from peaceably entering upon or establishing a settlement or residence *on any tract of public land subject to settlement or entry under the public-land laws of the United States*, or shall prevent or obstruct free transit over or through the public lands, provided this section shall not be held to affect the right or title of persons who have gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto in good faith.

The title of the act limits section 3 to persons occupying the public lands in any of the ways made unlawful by this section. The proviso in this section shows the legislature intended to refer to occupants of public lands by exempting those who occupy the land under the land laws, claiming title in good faith, even though they maintained their possession in a manner made unlawful by the first part of section 3.

Sections 4, 5, 6, and 7 relate wholly to the penalty, remedy, and procedure.

There is no language in the act that suggests that it relates in any manner to any subject except that expressed in the title, unlawful occupancy of public lands.

It defines what is unlawful occupancy of public lands, and provides remedies for the government and penalties for trespasser.

For any person to incur the penalty provided for violation of the act, or any part of the act, he must occupy the land in

one of the ways made unlawful by the act, and any indictment sufficient to state a crime under the act, and especially section 3, must show occupancy of public land by the defendant in some manner made unlawful by this section, and that the occupancy of the defendant prevented and obstructed another from entering upon public land and establishing a settlement or residence upon a tract of public land subject to settlement or entry, or prevented or obstructed free passage over the public lands.

The purpose of the act is so clearly expressed in its title and contents that there can be no doubt that it refers to *occupancy of public lands in some manner made unlawful by its provisions*, and does not extend to the protection of settlers after they have made entry upon the land and established their residence or settlement thereon.

Its provisions cannot be extended by construction beyond the grammatical and natural meaning of the terms employed on any plea of failure of justice.

Remington *vs.* State, 1 Ore., 281.

There can be no constructive crimes.

State *vs.* Lovell, 33 Iowa, 304.

The offense must be both within the spirit and the letter of the law.

Lair *vs.* Killmer, 1 Dutch, 522.

We are to look to the words in the first instance, and where they are plain we are to decide on them. If they be doubtful, we are then to have recourse to the subject matter; but at all events it is only a secondary rule.

Sedgwick on Statutory and Constitutional Construction, 2d ed., page 282.

We are therefore confined to the primary purpose of the act which was to define unlawful enclosures and prevent unlawful occupancy of the public lands, and cannot resort to the

history of the act to find a deeper purpose to protect settlers on their entered lands. Where the purpose is as clearly expressed as in this act, courts will not look beyond the enactment itself, as that is all the defendant is required to look to in determining his actions under the law, and even if there could be doubt as to the meaning of the law, the courts are required to and will give the defendant in error the benefit of the doubt as to the law as juries are required to give the benefit of doubt as to facts.

The second proposition of the plaintiff in error is that the statute should be construed as extending the application of the act to the entire period of homestead residence and settlement up to the time patent issues.

The language of the act does not refer to land held under entry or color of title in any manner, but only to public lands subject to entry and settlement under the public-land laws of the United States.

The title of the act refers only to *public lands* and their unlawful occupancy, and says nothing concerning lawful occupancy or the protection of homestead entrymen in any manner.

Section 1 refers to all enclosures on public lands, and makes the assertion of a right to the exclusive use and *occupancy of any part of the public lands of the United States*, without claim, color of title, or asserted right, unlawful.

Section 3 again refers to public lands only, and particularly describes the lands to which the act refers as "any tract of public land subject to settlement or entry, under the public-land laws of the United States, or transit over or through public lands."

Nowhere does the act refer to any except public lands, and it touches only on the unappropriated public domain.

> "Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment it is severed from the mass of public lands."
> Wilcox *vs.* Jackson, 13 Pet., 496-513.

"In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry acquired. If public lands before entry after it they are private property."

McGuire *vs.* Brown, 39 Pacific, 1060; 106 Cal., 660.

"So long as it remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreserved, it is such an appropriation of the tract as segregates it from the public domain."

Hastings, etc., R. Co. *vs.* Whitney, 132 U. S., 357.

In the light of these authorities the term public lands as used in this statute means the unappropriated public domain of the United States subject to entry and settlement under the land laws of the United States, so that when land is entered, residence established, possession maintained, and cultivation engaged in for a period of four years with the entry still in full force and effect, as alleged in the indictment herein, it is severed from the public domain, appropriated to private purposes, no longer subject to entry or settlement and no longer public lands.

To enlarge this statute to embrace such land would violate all rules of construction applicable to such statutes, make legislation never enacted, and create a purely constructive crime.

It is contended that the word establishing means more than to initiate, *i. e.*, to *keep* and *preserve;* to firmly fix. Grant that it does mean this, or even to finish or complete, and more is not claimed for it, it then must be construed with the context and cannot have any significance beyond its ordinary use as associated in the language of the act. The use of the words

"*Entering upon* or *establishing a settlement or residence on any tract of public land* subject to settlement under the public land laws of the United States"

suggests that Congress intended the act to apply to all the public lands at the time, whether they were surveyed or unsurveyed, and used the term *entering upon* as applicable to the entry of public land in the proper land office if it had been surveyed at the time of entry, and the term *establishing a settlement or residence* as applicable to the unsurveyed public lands before entry could be made on same in any land office, the word or should not be construed as meaning and where the words *entering upon* refer to one class of lands and the words *establishing a settlement or residence* refer to another class.

The courts and General Land Office have uniformly held that residence under the homestead act is established by the erection of a suitable dwelling house, and, taking up residence on the land, and recognize a distinction between establishing a residence and maintaining it. If once established within the required time, it may then be maintained or abandoned as the entryman may chose.

> "To enter means to acquire an inceptive right to a portion of the unappropriated soil of the United States by filing a claim with the Register of the land office."
>
> Lockwitz *vs.* Larson, 52 Pac., 279; 16 Utah, 275.

The word enter on and occupy have no synonyms that convey meaning more clearly than they do themselves.

Smith *vs.* Townsend, 29 Pac., 80-85; 148 U. S., 490.

That the lands are public lands must appear upon the face of the indictment.

Haynes *vs.* U. S., 817-819.

It is a sufficient defense to a proceeding under this act to show that land enclosed or occupied was not public land.

Cameron *vs.* U. S., 301-305 (5).

It is evident that the lands in question were not public lands of the United States within the meaning of that term as used in the acts of Congress for disposition of public lands.

Wilcox *vs.* Jackson, 13 Pet., 496-498.

In Cameron *vs.* U. S., *supra*, it was urged by the Government that the defense of an asserted claim or color of title could only relate to lands lawfully claimed. The court there held there was no authority to import the word lawful into the statute in order to change its meaning. Neither is there authority to import the protection of homestead entrymen into the statute and construe it to extend to the lands in question long before entered and severed from the public domain in order to make its penal provisions apply to the facts appearing in the indictment.

The supplemental authorities cited by plaintiff in error do not show a different or broader use of the term, but do define its ordinary meaning. The Bircher case construes the word made to mean maintained, but affirms the general rule that intention must be gathered from the words employed, and that while a case may fall within the mischief to be remedied and in the same class therewith if it be not within the words construction will not bring it therein.

Bircher *vs.* U. S., 159 Fed., 589-591.

The case of Kindred *vs.* The U. P. R. Co., 225 U. S., 582, construes the words public land to include lands in an Indian reservation because of the policy of the Government with respect to the extinguishment of the title of the Indians to the lands, and defines public lands in its ordinary sense to mean lands subject to sale.

In The U. S. *vs.* Blendaur, 128 Fed., 910, public lands is held to include forest reserves in order to prevent waste by cutting of timber, and likewise the Shiver case, where a homesteader took up land not for the purpose of establishing a residence and cultivation, but for the purpose of denuding

it of the timber and marketing the timber in a manner not consistent with residence or cultivation.

Shiver vs. U. S., 491.

The Brighton Ranch case was decided in November, 1885, and is almost the first case dealing with this statute. The questions raised herein seem not to have been before the court in that case, and it has never been followed by any of the later cases construing the act.

The Waddell case was decided in the October term of this court in 1884, prior to the passage of this act February 25, 1885.

We respectfully urge that the judgment of the court below sustaining the demurrer be sustained.

S. E. NAUGLE,
C. W. WATERMAN,
Attorneys for Defendant in Error.

UNITED STATES *v.* BUCHANAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 589. Argued December 3, 1913.—Decided January 5, 1914.

The term, "Public lands subject to settlement or entry," does not include lands that have been entered and a certificate of entry obtained therefor, and § 3 of the act of February 25, 1885, c. 149, 23 Stat. 322, does not apply to such lands.

An entry withdraws the land from entry or settlement by another and segregates it from the public domain, and the possessory right acquired by the entryman is in the nature of private property and entitled to protection as such; and interference with the peaceable possession of the entryman is not punishable under a Federal statute applicable only to public lands still subject to entry.

THE Grand Jury for the District of Colorado indicted Buchanan for a violation of the act "to prevent unlawful occupancy of the public land." The indictment charged that in February, 1907, one Edward Scott made a homestead entry, at the proper office, of a quarter-section of land in Colorado, and died, March 28, 1910, leaving the homestead entry in full force and effect; that thereafter "his heirs were in lawful possession of and were engaged in cultivating the said homestead land for the purpose of protecting their right as heirs to the same, until May 9, 1911, when the defendant, Buchanan, wilfully, wickedly, unlawfully and feloniously did prevent and obstruct said heirs from peaceably entering upon and establishing a settlement and residence on the said homesteaded land of the United States subject to settlement and entry under the public land laws." The defendant demurred on the ground that the facts charged did not constitute an offense punishable under § 3 of the act of February 25, 1885, c. 149, 23 Stat. 321, 322, which provides:

"SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, . . . any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States."

The defendant's demurrer was sustained and the Government brought the case here under the Criminal Appeals Act.

Mr. Assistant Attorney General Knaebel, with whom *Mr. S. W. Williams* was on the brief, for the United States:

The third section of the act of February 25, 1885, was intended for the protection of the right of a homestead claimant to continue his settlement and residence throughout the period required by the homestead law, no less than for the protection of his right to initiate settlement and residence; and the ruling of the trial court to the contrary was error. *Buford* v. *Houtz*, 133 U. S. 320; *Cameron* v. *United States*, 148 U. S. 301; *Camfield* v. *United States*, 167 U. S. 518; *Dickey* v. *Turnpike Co.*, 37 Kentucky, 113; *Golconda Cattle Co.* v. *United States*, 201 Fed. Rep. 281; *Heirs of Stevenson* v. *Cunningham*, 32 L. D. 650; *State* v. *Rogers*, 107 Alabama, 444; *United States* v. *Lacher*, 134 U. S. 624; *United States* v. *Mills*, 190 Fed. Rep. 513; *United States* v. *Perry*, 45 Fed. Rep. 759; see also Revised Statutes, § 2291; Black's Law Dict. 436; Cong. Rec., vol. 15, pt. 5, pp. 4768–4783; Cong. Rec., vol. 16, pt. 1, p. 622; Id., pt. 2, pp. 1456, 1478; Report H. R., No. 1325, 48th Cong., 1st Sess.; Sen. Ex. Doc., No. 127, 48th Cong., 1st Sess.; Sen. Rep., No. 979, 48th Cong., 2d Sess.

Mr. S. E. Naugle, with whom *Mr. C. W. Waterman* was on the brief, for defendant in error.

MR. JUSTICE LAMAR after making the foregoing statement of facts, delivered the opinion of the court.

The statute, under which the defendant was indicted, makes it unlawful to prevent "any person from peaceably entering upon or establishing a settlement or residence on public land, subject to settlement or entry." The indictment charges that the defendant prevented the heirs of the homesteader "from entering upon and establishing a settlement and residence on homesteaded lands of the United States subject to settlement and entry." This difference between the language of the statute—"public land of the United States"—and the charge in the indictment—"homesteaded land of the United States"—raises the question whether, after entry and before patent, land covered by a homestead claim is public land within the meaning of the act "to prevent unlawful occupancy of the public land."

In construing the statute it must be remembered that at the time of its passage in 1885, by tacit consent of the Government, any person could graze sheep and cattle upon any part of the public domain. *Buford* v. *Houtz*, 133 U. S. 320, 326; *Light* v. *United States*, 220 U. S. 523, 535. Many availed themselves of this privilege and the cattle of different owners fed together on the open prairie, no one claiming that thereby any exclusive right had been acquired. The first fences were built only around very small areas. But from this small beginning the practice rapidly grew, until in some cases vast tracts were fenced in by herdsmen who treated the land as though it was their own property. 5 H. R. 1325, 48th Cong. 1st Sess. These unlawful fences not only closed the roads and obstructed the mails, but there were occasions in which citizens were prevented from peaceably taking possession of these enclosed public lands and by settlement thereon securing the right to enter the same at the Register's office.

Under these circumstances Congress passed the act intended to protect the rights of the United States as proprietor, by making unlawful "all inclosures of any public land"; to prevent obstruction of the roads; to create a method for summary removal of fences; and to provide a punishment for those who prevented others from entering upon or establishing a settlement on public land subject to settlement or entry. But all its provisions related to public lands—not to private lands; to land subject to entry—not to land which had been entered in the Register's office; to land subject to settlement—not to land on which a settlement had already been established. For, as shown by the context, the word "established" did not mean "to fix unalterably" (*Osborne* v. *San Diego Co.*, 178 U. S. 22, 39), but to create or set up the settlement which had to be made prior to entry at the Register's office in the case of a preëmptor and could be so made in the case of a homesteader. Rev. Stat., §§ 2289, 2259, 2263, 2264, act of May 14, 1880; 21 Stat. 140, c. 89, § 3. *Stearns* v. *United States*, 152 Fed. Rep. 900, 902 (10); 4 Op. of Atty. Gen. 493. These provisions refer not to something to be done in the future but to a settlement already completed and require that within thirty days after this finished act, proof of such settlement shall be made. When, on that proof, or compliance with other statutory conditions, entry was made, the Preëmptor or Homesteader was entitled to possession and could protect himself by legal proceedings against intrusion by cattlemen or others.[1]

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[1] Sec. 2289. Every person who is the head of a family . . . shall be entitled to enter one-quarter section . . . of unappropriated public land. . . .

Sec. 2259. Every person, being the head of a family . . . who has made, or hereafter makes, a settlement in person on the public lands subject to preëmption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to

The indictment here charges that, after having entered this quarter-section at the Register's office, Moore remained in possession for three years and that when he died the homestead was in full force and was thereafter maintained by his heirs. This negatives any idea of abandonment. It implies that he not only entered the land at the proper office, but had established a settlement, erected a dwelling, and both acquired and maintained that "inceptive right" which "was the commencement of title." *Chotard* v. *Pope*, 12 Wheat. 586, 588; *Hoofnagle* v. *Anderson*, 7 Wheat. 212.

The land covered by the homestead of Moore was therefore not public land of the United States subject to entry or settlement. For, "in no just sense can land be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property." *Wisconsin R. R. Co.* v. *Price County*, 133 U. S. 496, 506; *Svor* v. *Morris*, 227 U. S. 524–528. The entry by Moore withdrew the land from entry or settlement by any other,

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enter with the Register of the land office . . . any number of acres not exceeding 160 . . . upon paying to the United States the minimum price of such land.

SEC. 2263. Prior to any entries being made under the provisions of § 2259, proof of the settlement and improvement thereby required shall be made to the satisfaction of the Register. . . .

SEC. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon and declaring his intention to claim the same under the preëmption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

and segregated the quarter-section from the public domain. The legal title remained in the Government until patent issued; but as against all except the United States he was the lawful possessor clothed with an inceptive title (*Sturr* v. *Beck*, 133 U. S. 541, 547, 549; *Bunker Hill Co.* v. *United States*, 226 U. S. 548, 550), which entitled him to maintain suits in equity or actions at law to obtain redress for a violation of his possessory rights. *Russian-American Co.* v. *United States*, 199 U. S. 570, 577. The homesteader having thus acquired the right to "treat the land as his own" so far as was necessary to carry out the purposes of the statute (*Shiver* v. *United States*, 159 U. S. 491, 497), it is apparent that this right was in the nature of private property, and entitled to protection as such. Interference with the possession of the homesteader or his heirs living on land thus withdrawn from entry was not punishable under a Federal statute applicable only to public lands subject to entry.

This view is sustained by the terms of the statute and is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued. But instead of doing so, it left the homesteader, who had acquired a possessory title, to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate. In both cases there was right of possession, and in both cases wrongs against possession could be redressed. Such seems to have been the practical construction of the statute since its passage, twenty-eight years ago, for we are cited to no case in which a prosecution has been instituted, in a Federal court, against one interfering with the possession of a homesteader after entry and before patent.

Judgment affirmed.